IN THE

Supreme Court of the United States

October Term, [redacted] 1957.

No. 15. 2

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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I.

Reply to Respondent's Argument on the Multiplication of Offenses.

Respondent argues (Br. pp. 20-31) that this case does not involve "the multiplication of an essentially single offense into several offenses" (Br. p. 20). It presents three theories to support its position: The first, that there were at least six contempts (Br. p. 30, n. 16), treating the refusal to identify petitioner's co-defendants as one contempt and the refusal to indentify the specified third persons as separate contempts; the second, that there were at least nine contempts (Br. p. 26), treating each refusal to identify a different named person on June 30 as a separate offense; third, even if a single offense were committed, treat-

ing the refusals to answer on June 26 and the refusals to answer on June 30 as one contempt, the trial judge was within his power in imposing the criminal sanctions of one year imprisonment as he did in this case (Br. pp. 22-23). We treat these arguments separately.

A. Respondent concedes that at the outset of petitioner's cross-examination on June 26, she declined to identify persons as members of the Communist Party because petitioner didn't want to become a "Government informer" (Br. p. 7), that she didn't want a person "to suffer the loss of his job, his income, and perhaps be subjected to further harassment," that "however many times" she were asked to identify a person as a communist, she couldn't bring herself to do it "because I know it means loss of job, persecution for them and their families, . . . even opens them up to possible violence" (Br. p. 9).

At various points in its brief (pp. 25, 27, 29), respondent also concedes, assumedly, that it would have been invalid to punish as a contempt subsequent refusals to answer similiar questions upon the same grounds. "Her refusals, though plural in form," would then be "but one in essence" (Br. p. 27). Respondent argues, however, that because petitioner identified certain persons as members of the Communist Party who could not be injured by her testimony such as the national chairman of the Communist Party, William Z. Foster, a person who was deceased, and co-defendants who had not rested, that therefore for this reason petitioner's continued adherence to her original position with respect to those who would be injured if she informed on them results in the commission of separate contempts each time she refused to identify a named person. Respondent asserts that petitioner should not be permitted to so "pick and choose" (Br. p. 31); that

the proper course apparently would have been to refuse to identify any persons as members of the Communist Party even if they were deceased or as nationally prominent as William Z. Foster, if multiplied offenses were to be avoided. Then petitioner's refusals would have been but "one in essence."

The arbitrary rule which respondent seeks to improvise runs directly counter to the policy of the law. The contempt power is invoked against a recalcitrant witness upon the underlying principle that the cause of justice requires the testimony of all witnesses. The policy of the law is to encourage witnesses to give their testimony in law suits when required to do so. Here a witness has limited her refusal to answer questions solely with respect to persons who may be injured by her identification of them as members of the Communist Party; as to all others she gives the testimony requested by the prosecution. Yet respondent would invoke a rule of law which would discourage the giving of such testimony and encourage additional withholding of testimony.

The inconsistency of respondent's position is exemplified by its acceptance of the *Costello* ruling on this aspect of the case. Respondent states that "it is true . . . that where a witness flatly refuses to testify at all his contempt cannot be multipled by repeatedly asking him questions" (Br. p. 25). But, argues respondent, if the witness does not totally refuse to answer, if he narrowly draws the area of refusal—no matter how single the attitude—then the contempt is multipled each time there is a refusal to answer on the same ground. Thus, a *Costello* commits only one punishable act of contempt by refusing to answer all questions; the petitioner commits as many acts of contempt as the prosecutor chooses to ask questions which the

petitioner, upon the same conscientious grounds, declines to answer. Under such theory of law, the exercise of the contempt power becomes a means, not of obtaining the testimony of witnesses, but of punishing those who testify too much.

Fundamentally, respondent refuses to accept the view that the test must be whether the offense was a single course of conduct, whether there was a singleness of thought, purpose or action which constituted but a "single impulse" (Pet. Br. p. 34). Under this test, respondent's argument falls of its own weight. For the petitioner from the outset, with undisputed sincerity and respect on this record, advised the court that she would, and did, answer every question put to her except that she could not inform upon persons, that she could not identify persons as Communists who would be injured by such identification. This was her position at the outset and she adhered to this position. Respondent has not adduced the slightest proof to indicate why petitioner's continued adherence on June 30 to her originally stated position of June 26 was a separately punishable contempt, limited as the area of refusal was in this case.

B. Alternatively, respondent argues (Br. pp. 24-27) that even if petitioner did adhere to her position throughout her cross-examination, still her position stated on June 26 was merely a "blanket advance declaration of an intention not to be cooperative" and that petitioner could not limit the "classes or types of questions" which the prosecutor could ask. Respondent immediately concedes, however, that a witness' refusal to answer a certain question cannot be made the basis of multiple contempts by continuing to ask the same question in different forms, and this respondent concedes is true even when the witness

initially chooses to answer no questions at all. Respondent states that the aforesaid rules apply when the questions seek to establish but a single fact, or relate to but a single subject of inquiry. Here, however, it is argued that the questions sought to prove "a number of facts" and related to "at least as many subjects as the number of persons referred to in the questions, *i. e.,* nine different persons" (Br. p. 26).

If the attitude, conduct, intent or impulse of the witness is plainly shown to be single, the asserted offense cannot be multiplied merely because the prosecutor's questions refer to different persons (Pet Br. pp. 34-38). In *Costello,* the inquiries were not with respect to a single fact or subject matter (Pet. Br. p. 36), yet respondent concedes that offenses could not be multiplied after the witness initially stated he would answer no questions at all. In the case herein, moreover, the subject matter of the inquiries was the same and the grounds for the refusal the same, as respondent's Statement of the Case and the opinion of the court below make plain.

Respondent argues that *Costello* also held that total refusals to answer the questions of the legislative committee on two separate days were punished as separate contempts, and that such ruling justifies punishing petitioner separately for every refusal to answer concerning a different individual (Br. p. 27, n. 13). Aside from other distinctions (Pet. Br. p. 39, n. 21), Costello's different excuses for ill health on the separate days were proven to be baseless in fact. His own doctor contradicted him. No such comparable situation is presented here. Petitioner sought in every way to answer every question put to her, told how long she knew the specified persons who were proven undisputedly by respondent to be members of the Communist

Party. The trial judge recognized that she did not want to be an informer, and petitioner made clear from the outset that her unwillingness to act as an informer was solely because her identification might injure persons in their person or their livelihoods. The prosecutor and the trial judge knew this clearly when the punishment of one year imprisonment for the alleged contempts of June 30 was imposed.

C. Respondent argues that if petitioner's "several refusals of both days constituted but one contempt" (Br. p. 22), the trial judge was not precluded from invoking criminal contempt powers with respect to the June 30 refusals even if civil contempt powers were solely invoked with respect to the June 26th refusals (Br. p. 22).

This argument in the first place overlooks the fact that the court below ruled (and respondent sought no review) that since the civil contempt proceedings of June 26 were concluded without any notice to petitioner that she might in the future be subjected to criminal contempt charges, due process was violated (App. F., pp. 33-34). If, as respondent assumes, only a single contempt was committed on both days, then under the ruling of the court below the trial judge exhausted his power to punish in contempt when he concluded the civil contempt proceedings without notice of future criminal sanctions.

In the second place, if the single contempt was punishable civilly and criminally by the trial judge, he did so by first confining the petitioner for the duration of the trial and then sentencing her after the trial to three years imprisonment. Respondent itself states: "From September 8 to September 11, 1952, petitioner was again confined this time pursuant to a criminal contempt judgment [the

three years judgment] based upon the same refusals to answer as those on which the civil contempt order had been based" (Br. p. 11, n. 8). This three year judgment, lacking due process, was later set aside on appeal, but the one year sentence here was imposed intentionally below for a "separate" contempt and this Court cannot now, it is respectfully submitted, retry the proceedings *de novo* and enter new judgments based upon respondent's version of what "could have been done."

In the third place, this phase of respondent's argument is based on the view that the refusals to answer on June 30 were contempts of equal stature with the alleged contempts of June 26 when petitioner initially stated her grounds for declining to answer. Petitioner contends, as *Costello holds,* that the subsequent refusals to answer on June 30 were not contempts, but merely statements of adherence by petitioner to her original position. The contempt, if it was committed at all, occurred only on June 26 and for this petitioner was punished civilly and criminally by the three years sentence. The one year sentence which respondent now seeks to impress on the "single" contempt of both June 26 and June 30 was in fact imposed solely for the conduct of June 30 when no contempt in legal contemplation was committed.

The petitioner was neither "left wholly undisciplined or only partially punished," as respondent contends (Br. p. 31). She was disciplined and severely punished by confinement in prison for seventy days (Pet. Br. pp. 10-19). The contention here is only that it was unlawful to treat her continued refusal to answer upon the same grounds as additional offenses punishable by one year imprisonment. Respondent has essentially abandoned the reasoning of the courts below, and attempted to create different

theories, however contradictory, to support the judgment herein. The essential fallacy of these views is bottomed upon respondent's disregard of the record, the historical and legal precedents which govern the exercise of the drastic power of contempt, and the conscientious position of petitioner. The unfettered contempt power for which respondent contends, in operation and effect, will give prosecutors in Smith Act trials a weapon which will either make it impossible for an accused to take the stand, or substantially undermine his defense if he does.

II.

Reply to Respondent's Argument on the Dominant Purpose of the Contempt Proceedings.

The respondent contends that the principal purpose of the punishment of petitioner was "vindication of the authority of the court, and so was properly made criminal in character" (Br. p. 32). Having said this much, respondent's "Statement of the Case" and "argument" proves quite the contrary.

Respondent states that "it is true" that at the time of sentencing the trial judge expressed the hope that petitioner would "purge" herself of the contempt (Br. p. 33), but argues that this did not indicate that the purpose of the sentence was to coerce the petitioner to answer for the benefit of the prosecutor—"the characteristic purpose of a civil contempt judgment" (Br. p. 34). But respondent omits from the Statement of the Case and its argument, the following statement of the Court at the time of imposing the one year sentence: "Now, the Government was entitled on cross-examination to show, if they could, that that person whom Mrs. Yates impliedly said was a very foolish person was a friend of Mrs. Yates of long standing

who had worked with her, whatever the proof would show [See Pet. Br. p. 16, n. 10]. We do not know" (R. 32). This statement makes plain not only the trial court's self identification with the prosecutor, but the court's purpose to obtain the answers.

The respondent states that the court agreed with counsel that it was too late for petitioner "to comply literally with the judge's orders by answering the questions at that trial and before that jury" (Br. p. 34). But that does not indicate that the principal purpose of the court was not to coerce the answers of the petitioner. The court subsequently made clear what its understanding was. The view of the trial court was that there is a difference between "termination of the trial" and "termination of the litigation" (App. C, p. 13). The trial had been literally terminated, the court agreed, but the litigation had not been completed (since appeals were pending) and therefore, "the answers now sought to be coerced from defendant Yates *qua* witness have undeterminable potential value to the plaintiff in the criminal case now pending on appeal" (App. C, p. 15). This was the undeviating view of the trial judge throughout all the contempt proceedings (Pet. Br. pp. 5-20).

Respondent is therefore in error as to the dominant purpose of the contempt proceedings, and no less so because it urges that the court desired only to have petitioner "purge" herself by answering in order to show "a spirit of contriteness and regret for her previous refusals" (Br. p. 34). This only establishes that the court was intent on obtaining the answers, albeit for alleged "humane" reasons. To treat the answers as a "purge" of contempt means only that the petitioner in the court's opinion had "the keys to the jail in her own pocket," and this was precisely

what the court told the petitioner was the situation with respect to both the one and three years sentence of imprisonment (Pet. Br. p. 18).*

Respondent argues that the court's statements should be treated as merely "humane, merciful" remarks, solely as matters of "grace" (Br. pp. 34-35). But insistence after the trial that petitioner answer the questions and renounce her conscientious scruples was neither "humane" nor "merciful." If the principal purpose of the contempt proceedings was punishment to vindicate the court's authority, the basic consideration on the question of mitigation of sentence was the length of the confinement which petitioner had already endured. The authority of the court could not be "vindicated" by answering questions after trial when petitioner had declined to answer the questions during the trial. In insisting that the questions be answered before any consideration of mitigation of the sentence, the trial judge clearly indicated that the dominant purpose of the contempt proceedings was coercion, not punishment.

Not only does respondent disregard what the court said at the time of sentence, but it asks this Court to disregard all statements made by the trial judge in these closely related contempt proceedings (Br. p. 35). But as the court below made clear, all of the subsequent statements of the

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*". . . if the violation is proved the wrongdoer is committed to prison to remain until he purges himself of his contempt by doing the right or undoing the wrong." Beale, *Contempt of Court, Criminal and Civil,* 21 Harv. L. Rev. 161, 169. See also, *Doyle v. London Guarantee & Acci. Co.,* 204 U. S. 599, 605-8. Here the trial judge assumed that he had the power to compel petitioner to do "the right" by answering the questions, and thus purging her of the contempt entirely. His purpose was thus plainly shown to be coercive.

trial judge illumined his real intent and purpose from the beginning. "Since proceedings in contempt are *sui generis,* here the whole course of action in the criminal trial and all subsequent proceedings must be appraised" (App. F, p. 34, n. 5).

III.

Reply to Respondent's Argument on the Excessiveness of the Sentence of Imprisonment.

Respondent maintains that the sentence of one year imprisonment imposed upon petitioner was not excessive. It makes no attempt to discuss the history and purpose of the Contempt Act, nor does it discuss the legal precedents which indicate how grossly excessive the sentence was here (Pet. Br. pp. 51-58).

Nor does respondent dispute the fact that under the legal precedents there was in actuality no obstruction of justice here, the essential characteristic upon which the contempt power rests (Pet. Br. pp. 40-44). Respondent argues that the issue as to whether there was a contempt committed at all by the petitioner was never raised at any prior stage of the trial, nor in the petition for writ of certiorari, and is therefore not properly before this Court (Br. p. 20, n. 11). But on the issue of *the excessiveness of the sentence,* the question was always raised (R. 33-34; Pet. Br. in Court of Appeals, p. 51), and is a subsidiary question fairly comprised within Question 3 in the petition for a writ of certiorari (p. 3). Respondent labors to show that the questions had some relevance (See Pet. Br. pp. 43-44), but it makes no attempt to prove that the refusals to answers in any way impeded the administration of justice.

Respondent points to the permissible maximum sentence of one year in legislative contempts (Br. p. 37). It over-

looks that an accused in such proceeding is entitled to every element of due process, while in a summary contempt proceeding the accused is entitled to none (Pet. Br. p. 55, n. 22). As to the relevance of 18 U. S. C. 402 and the decision in *Ryals v. United States,* 69 F. 2d 946 (C. A. 5, 1934) (Pet. Br. p. 55), respondent can only argue that the maximum sentence of six months for indirect contempts can be applied to a single offense while here there were "multiple acts of disobedience" (Br. p. 38), a clear indication of the use to which prosecutors can put their theory of multiplying contempts.

The sum of respondent's argument is that the sentence of one year imprisonment was not excessive because petitioner, under a claim of conscience, took over the "management" of the trial and sought "to pick and choose" the questions to which she would give answer (Br. pp. 38-40). This is a contrived argument based on a distortion of the record, it is respectfully submitted. Petitioner was subjected to a lengthy cross-examination (Tr. 11,228-740, 11,853-72). Her answers were full and direct. She made no attempt to evade any question, and even with respect to the named individuals, answered how long she knew them. Her confirmation of respondent's proof as to the membership of these persons in the Communist Party before the jury was virtually complete, despite her conscientious scruples at identifying them. Everything in the record indicates petitioner's desire to make all her testimony available to the prosecutor except the extremely narrow matter of her own identification of persons as members of the Party. The prosecutor was never prevented from asking petitioner questions concerning her denial of participation in the alleged "conspiracy." But instead of asking such questions, the prosecutor sought only names (Pet. Br. pp. 13-14).

Conclusion.

Respondent's own arguments establish the invalidity of the judgment and sentence of contempt imposed upon petitioner. The judgment of the court below should be reversed.

Respectfully submitted,

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